No. 87-607

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JAMES H. WEBB, JR.,
SECRETARY OF THE NAVY, PETITIONER

v.

CARMELO MALDONADO

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the hourly rate awarded to an attorney under Title VII of the Civil Rights Act of 1964, as amended, must be limited solely to the attorney's customary billing rate or may be based as well on the rate prevailing in the community for attorneys of comparable skill, experience, and reputation.

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STATEMENT OF THE CASE

After prevailing before the Secretary of the Navy on his claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., respondent Carmelo Maldonado brought his motion for attorneys'

fees and costs in District Court. Excerpts of Record (E.R.) 80. In support, Maldonado submitted declarations attesting that the prevailing market rate in the San Francisco area for attorneys of comparable qualifications, experience, and skill in similar cases was at least $110 per hour. E.R. 105. This evidence of San Francisco rates was uncontroverted by the government. E.R. 145. In reaching its decision, the district court considered this evidence, and, in addition, evidence of the customary billing rate of Maldonado's attorney for noncontingent matters. Petition (Ptn.), App., 6a.

Based on this evidence, the district court awarded a rate of $110 per hour for 165.35 hours of work on the merits. However, petitioner Secretary of the Navy claimed that respondent was entitled to no more than $80 per hour under the rule of Laffey v. Northwest Airlines, Inc. 746 F.2d

4 (D.C. Cir. 1984), cert. denied, 472 U.S. 1021 (1985) -- that, in nearly every case, the rate to be awarded is limited to the attorney's customary billing rate. At issue in this case, therefore, is $4,960.50, the difference between $110 per hour and $80 per hour for 165.35 hours.

The Court of Appeals for the Ninth Circuit affirmed the award of attorney's fees, stating:

> This Circuit does not follow the legal standard set forth in Laffey. "While evidence of counsel's customary hourly rate may be considered by the District Court, it is not a[n] abuse of discretion in this type of case to use the reasonable community standard that was employed here." White v. City of Richmond, 713 F.2d 458, 461 (9th Cir. 1983).
>
> Maldonado v. Lehman, 811 F.2d 1341, 1342 (9th Cir. 1987).

The government's petition for rehearing was denied and the suggestion for rehearing en banc was rejected. Ptn., App., 9a.

SUMMARY OF ARGUMENT

This Court has determined that the hourly rate to be awarded under an attorney's fee statute such as 42 U.S.C. § 2000e-5(k) is calculated according to rates prevailing in the community for attorneys of reasonably comparable skill, experience and reputation. Blum v. Stenson, 465 U.S. 886, 895 and n.11 (1984). In the present case, the Ninth Circuit Court of Appeals correctly affirmed the district court's application of this standard. The government unsuccessfully urged the Ninth Circuit to adopt the method approved by the District of Columbia Circuit in Laffey for determining an attorney's reasonable hourly billing rate.

The rule of Laffey is inconsistent with Blum v. Stenson. Furthermore, any conflict between this case and Laffey will in all likelihood disappear because the

District of Columbia Circuit recently decided to re-examine the Laffey decision if this Court denies the government's petition. Save Our Cumberland Mountains, Inc. v. Hodel, 826 F.2d 43 (D.C. Cir. 1987), reh'g granted en banc (Oct. 14, 1987), order holding proceedings in abeyance (Nov. 5, 1987).

REASONS FOR DENYING THE WRIT

I

THE DISTRICT OF COLUMBIA CIRCUIT SHOULD BE GIVEN THE OPPORTUNITY TO ELIMINATE THE CONFLICT BETWEEN CIRCUITS BY OVERRULING LAFFEY

In Save Our Cumberland Mountains, Inc. v. Hodel, 826 F.2d 43 (D.C. Cir. 1987), reh'g granted en banc (Oct. 14, 1987), order holding proceedings in abeyance (Nov. 5, 1987), a divided court reluctantly applied the Laffey rule that an attorney's customary billing rate is the rate to be awarded "in almost every case." Laffey, 746 F.2d at 24. In varying degrees, each

member of the court cast serious doubt on the continuing validity of Laffey.

In his majority opinion in Save Our Cumberland Mountains, Judge Bork noted that the attorneys in Laffey charged lower than market rates, but that the court could not adjust the attorneys' rates to reflect that lost income. Judge Bork stated: "Whether or not Laffey's position on this point is correct -- and the dissent presents a serious argument that it may not be -- this panel is bound by that position as the law of the circuit." 826 F.2d at 49.

Finding Laffey to be the binding law of the circuit, Judge Ruth Bader Ginsburg filed a concurring opinion in Save Our Cumberland Mountains. However, Judge Ginsburg questioned Laffey's consistency with the Supreme Court's decision in Blum v. Stenson. She stated that Laffey should be reexamined, and declared that: "[W]ere we deciding initially what fee calculation

regime is most compatible with congressional intent, I would vote to treat all fee seekers in the Blum manner." 826 F.2d at 54.

Chief Judge Wald dissented on the issue of Laffey in Save Our Cumberland Mountains. He stated:

> Blum explicitly holds that Congress did not intend statutory fees to vary depending upon the clients a lawyer serves. Thus, someone who typically represents environmentalists is entitled to the same fees as one who represents industry in the same cases, other qualifications being equal. Yet, today this court, harking to the siren song of Laffey, distances itself even further from that congressional intent, establishing a level of statutory compensation that depends solely upon the level of pay the attorney asks from his clients. The highest paid law firm in town whose pro bono work amounts to less than 5% of its billable hours will henceforth receive five times the fee for the same case as the idealistic lawyer who devotes 95% of his practice to nonpaying or low paying clients. If this is what Laffey has wrought, it is time that we or Congress took a harder look.
>
> 826 F.2d at 60 (Wald, C.J., concurring and dissenting).

On September 10, 1987, the plaintiffs' attorneys in Save Our Cumberland Mountains filed and served on the U.S. Department of Justice a petition for rehearing and suggestion for rehearing en banc.[1/] On October 14, 1987, the petition for rehearing was denied and the suggestion for rehearing en banc was granted. App., infra, 1a-2a. On October 21, 1987, the government filed a motion for reconsideration of the order granting rehearing en banc, or in the alternative to hold the en banc proceedings in abeyance.

On November 5, 1987, the court issued an order stating that, after final disposition of the present petition by this

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1/ The Solicitor General's petition in this case was filed on October 14, 1987 and cites Save Our Cumberland Mountains five times, but fails to mention the fact that a petition for rehearing was pending before the District of Columbia Circuit. Nor does the petition mention that all three judges on the panel in Save Our Cumberland Mountains questioned the validity of Laffey and that two judges expressly found it to be wrongly decided.

by this Court, the court would if necessary consider en banc whether the Laffey decision should

> be overruled to the extent that it holds that in awarding attorneys' fees to a private law firm that customarily charges below the prevailing community rate in order to serve a particular type of client, courts should calculate the "reasonable hourly rate" according to the hourly rates charged in similar cases by that firm, as opposed to rates that reflect the prevailing community rate for similar legal services[.] See Blum v. Stenson, 465 U.S. 886 (1984).

App., infra, 3a-4a.

Thus, the Court of Appeals for the District of Columbia Circuit en banc intends to address the Laffey issue should this Court deny the government's petition.

This Court should not utilize its certiorari jurisdiction to review a conflict, such as that in the present case, which can be resolved by the lower courts. As Professor Moore states:

> [W]here there are cases pending in the lower courts that may well resolve the conflict, or more clearly frame the issue that is the subject of the conflict, certiorari may be denied

> notwithstanding the existence of the conflict. [Footnote omitted.] In sum, "[t]he nub of all these qualifications is that a conflict of decisions may be safely relied on as a ground for certiorari only in instances where it is clear that the conflict is one that can be effectively resolved by the Supreme Court alone, and that the disagreement among the lower courts is one that should be promptly dissolved." [Footnote omitted.]
>
> 13 J. Moore, H. Bendix & B. Ringle, Moore's Federal Practice ¶ 817.21 (2d ed. 1985) (quoting Justice Harlan).

If this Court denies the government's petition for a writ of certiorari, then the Court of Appeals for the District of Columbia Circuit will re-examine the validity of Laffey en banc. In the event that the circuit overrules or significantly modifies the Laffey decision, there will be no conflict between the circuits for this Court to address.[2/] Furthermore, this

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2/ The Solicitor General has cited no court of appeals decisions apart from those of the District of Columbia Circuit which adopt the Laffey rule. Respondent's research has disclosed no such decisions.

Court will have the benefit of the wisdom of the Court of Appeals for the District of Columbia, en banc, should it choose to examine the issue at a later date.

II

THE NINTH CIRCUIT DECISION IN THIS CASE IS FULLY CONSISTENT WITH BLUM v. STENSON

In Blum v. Stenson, 465 U.S. 886, 895 (1984), this Court held that statutory fee awards "are to be calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or nonprofit counsel." In a footnote accompanying this passage, the Court explained that the "prevailing market rates" are those "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." Id., 465 U.S. at 895 n.11. The Ninth Circuit in this case properly applied the

"reasonable community standard" established in Blum.

Because Blum involved a fee award to nonprofit legal services attorneys, the Solicitor General contends that the Court has not yet established a method for awarding hourly rates to private attorneys who have customary billing rates. Ptn. 6, 12. But the Court clearly stated in Blum that "Congress did not intend the calculation of fee awards to vary depending on whether plaintiff was represented by private counsel or by a nonprofit legal services organization." 465 U.S. at 894. The Court reiterated, "we decline[] to draw a distinction with respect to the use of market rates between profit and nonprofit law offices." Id. at 901 n.18. The Congressional intent identified by the Blum Court also requires that fee awards be calculated in the same manner whether plaintiff is represented by a private attorney whose

clients have a limited ability to pay or by a commercial firm.[3/]

The Court in Blum rejected the argument of the Solicitor General that awards of prevailing market rates to salaried attorneys employed by legal services organizations resulted in windfalls. The Court explained that since Congress clearly intended that prevailing market rates be awarded to all attorneys, such rates do not constitute a windfall. 465 U.S. at 895. The same "windfall" argument by the Solicitor General in this case should be rejected. An award of a prevailing market rate which may exceed a private attorney's billing rate is no more a windfall than is

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3/ Under Blum, courts must avoid "decreasing reasonable fees because the attorneys conducted the litigation more as an act of pro bono publico than as an effort at securing a large monetary return." Blum, 465 U.S. at 895, quoting Stanford Daily v. Zurcher, 64 F.R.D. 680, 681 (N.D. Cal. 1974), aff'd, 550 F.3d 464 (9th Cir. 1977), rev'd on other grounds, 436 U.S. 547 (1978).

a market rate which exceeds the cost of providing nonprofit legal services.

III

THE LAFFEY RULE SHOULD NOT BE ADOPTED, SINCE ITS RATIONALE IS WHOLLY UNPERSUASIVE

The legislative history of the attorneys' fees statutes does not support the holding in Laffey. In enacting the Civil Rights Attorneys' Fee Awards Act of 1976, 42 U.S.C. § 1988, Congress cited Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974), as setting forth the appropriate standards for calculation of a fee award. S. Rep. No. 1011, 94th Cong., 2d Sess. 6, reprinted in 1976 U.S. Code Cong. & Admin. News 5908, 5914. Johnson discussed twelve factors for district courts to consider in awarding fees. Among those factors were "[t]he customary fee for similar work in the community" and "awards in similar litigation." 488 F.2d at 718,

719. The Johnson court did not mention the fee applicant's own billing rate and did not give it a presumptive effect.

Congress also cited Stanford Daily v. Zurcher, 64 F.R.D. 680, 684 (N.D. Cal. 1974), aff'd, 550 F.2d 464 (9th Cir. 1977), rev'd on other grounds, 436 U.S. 547 (1978); Davis v. County of Los Angeles, 8 E.P.D. ¶ 9444, 8 F.E.P. Cases 244 (C.D. Cal. 1974); and Swann v. Charlotte-Mecklenburg Board of Education, 66 F.R.D. 483 (W.D.N.C. 1975), as cases which correctly applied the standards for fee awards. S. Rep. No. 1011 at 6. The Stanford Daily court stated: "This court does not accept the attorneys' usual billing rates as definitively fixing their billing rates for this litigation." 64 F.R.D. at 684. Davis held that a proper factor is "the fee customarily charged in the locality for similar legal services." 8 F.E.P. Cases at 246. In Swann the court

based its award in part on the fees charged by defendants' counsel and on the rates charged by attorneys in federal court work. 66 F.R.D. at 485, 486. None of these cases support the Laffey proposition that an attorney's customary billing rate is presumptively his or her market rate.

Moreover, as Judge J. Skelly Wright noted in his dissenting opinion in Laffey,

> [H]ad Congress intended so straightforward an approach as equating market rates with historical billing rates, it would have said so. That it did not is itself a strong indication that a law office's billing practice is to be but one consideration among many in the required calculation.
>
> 746 F.2d at 33 (Wright, J., dissenting).

That a fee award is not to be based on one factor to the exclusion of all others was established by the Court in City of Riverside v. Rivera, ___ U.S. ___, 106 S.Ct. 2686 (1986). The Court there rejected the contention that a fee award should be calculated solely by reference to

the amount of damages recovered. The Court held that the amount of damages is "only one of many factors that a court should consider" in calculating a fee award. Id. at 2694. Laffey's focus on an attorney's customary billing rates, and disregard of all other factors such as his or her skill, experience, reputation, performance in the litigation before the court, and the prevailing community rates, is thus contrary to City of Riverside v. Rivera.

Laffey also creates an anomalous distinction between the fee awards of private practitioners and lawyers employed by nonprofit legal services organizations. Under Laffey, the former are entitled to no more than their customary billing rates; the latter are entitled to a rate based on that charged by comparable lawyers in the community. The Laffey approach makes it "conceivable that the rate awarded a first year lawyer at a Legal Aid office would

exceed that awarded to a vastly more experienced attorney whose practice, though private, was deliberately geared towards low paying clients." 746 F.2d at 33 n.4 (Wright, J., dissenting). Moreover, as Chief Judge Wald noted in his opinion in Save Our Cumberland Mountains, Laffey also requires payment of high rates to the attorney in an expensive law firm who does little pro bono work, and payment of low rates to the attorney whose practice is geared to nonpaying or lowpaying clients. 826 F.2d at 60 (Wald, C.J., concurring and dissenting). These anomalies are contrary to Blum, which requires that all attorneys be compensated according to the rates prevailing in the community for attorneys of comparable skill, experience, and reputation.

The Solicitor General asserts that an attorney's customary billing rate "accurately reflects his background, ex-

perience, and skill relative to that of other attorneys in the community." Ptn. 11. This assertion ignores the fact -- recognized even in the majority opinion of Judge Bork in Save Our Cumberland Mountains -- that an attorney's billing rate may be lower than the market rate because of the "personal satisfactions" derived by the attorney in representing certain clients. 826 F.2d at 49. Further, the attorney's lower rates may reflect the clients' ability to pay and the attorney's professional interests. Laffey, 746 F.2d at 34 (Wright, J., dissenting.) The Ninth Circuit took judicial notice in White v. City of Richmond, 713 F.2d 458, 461 (9th Cir. 1983) that "many civil rights practitioners do not bill their clients at an hourly commercial rate." To hold that civil rights attorneys are limited to the low rates they charge their clients would fly in the face of congressional intent

that such attorneys be compensated in the same manner as attorneys engaged in anti-trust litigation. S. Rep. No. 1011, 94th Cong., 2d Sess. 6 (1976).

Furthermore, the Solicitor General's contention that the Laffey approach is an easier, more objective, less arbitrary method of calculating fees cannot be supported. It can be as difficult to determine a "customary" billing rate as it is to determine the prevailing market rate, because an attorney may charge different rates depending on the ability of the client to pay, the attorney's professional interests, his or her personal satisfactions, and other factors. Thus, in Save Our Cumberland Mountains, one of the plaintiffs' attorneys billed his clients on the basis of their ability to pay and charged nothing to those who could afford no fee. His reduced rate -- reflecting ability to pay -- for national environmental and

conservation groups was $75 to $100 per hour. The court awarded him $100 per hour, explaining that it was giving him "the benefit of any doubt." 826 F.2d at 48. Laffey provides no principled basis for choosing an hourly rate of $100 or $75 or a figure in between. The ease, objectivity, and predictability promised by Laffey is simply an illusion.

The policy arguments advanced by the Laffey majority and the Solicitor General in this case are poor excuses for adoption of a rule that is in contravention of the legislative history of the attorneys' fees statutes and is inconsistent with Blum and other precedents of the Court. The Ninth Circuit decision rejecting Laffey was correct and should not be disturbed.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Counsel for Respondent

November 1987

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-5984 September Term, 1987
CA No. 81-02238

Save Our Cumberland Mountains, Inc., et al.

v.

Donald Hodel, Secretary of Interior, et al.

Before: Wald, Chief Judge; Ruth B. Ginsburg and Bork, Circuit Judges

[Filed Oct. 14, 1987]

ORDER

Upon consideration of appellees' petition for rehearing, it is ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:

George A. Fisher
Clerk

Circuit Judge Bork did not participate in this order.

Chief Judge Wald would grant the petition for rehearing.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-5984 September Term, 1987
CA No. 81-02238

Save Our Cumberland Mountains, Inc., et al.

v.

Donald Hodel, Secretary of Interior, et al.

Before: Wald, Chief Judge; Robinson, Mikva, Edwards, Ruth B. Ginsburg, Bork, Starr, Silberman, Buckley, Williams and D. H. Ginsburg, Circuit Judges

[Filed Oct. 14, 1987]

ORDER

Appellees' suggestion for rehearing en banc has been circulated to the full Court. The taking of a vote thereon was requested. Thereafter, a majority of the judges of the Court in regular active service voted in favor of the suggestion. Upon consideration of the foregoing, it is

ORDERED, by the Court en banc, that appellees' suggestion for rehearing en banc is granted.

A future order will govern further proceedings herein.

Per Curiam
FOR THE COURT:

George A. Fisher
Clerk

Circuit Judge Bork did not participate in this order.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-5984 September Term, 1987
CA No. 81-02238

Save Our Cumberland Mountains, Inc., et al.

v.

Donald Hodel, Secretary of Interior, et al.

Before: Wald, Chief Judge; Robinson, Mikva, Edwards, Ruth B. Ginsburg, Bork, Starr, Silberman, Buckley, Williams, D. H. Ginsburg and Sentelle, Circuit Judges

[Filed Nov. 5, 1987]

ORDER

This Court's order of October 14, 1987 granted appellees' suggestion for rehearing en banc and indicated further proceedings would be controlled by a future order. On October 21, 1987 appellants filed a motion for reconsideration of the order granting rehearing en banc or in the alternative to hold the en banc proceeding in abeyance. Upon consideration of the foregoing, it is

ORDERED, by the Court en banc, that the motion for reconsideration is denied, and it is

FURTHER ORDERED, by the Court en banc, that the alternative motion is granted and further proceedings herein are held in abeyance pending final disposition by the Supreme Court of Case No. 87-607, Webb v. Maldonado (peti [sic] for certiorari filed

October 14, 1987), and a further order of this Court scheduling further proceedings, if necessary. Such an order will establish a schedule for the filing of briefs directed only to the following question:

> Should Laffey v. Northwest Airlines, Inc., 746 F.2d 4 (D.C. Cir. 1984), cert. denied, 472 U.S. 1021 (1985), be overruled to the extent that it holds in awarding attorneys' fees to a private law firm that customarily charges below the prevailing community rate in order to serve a particular type of client, courts should calculate that "reasonable hourly rate" according to the hourly rates charged in similar cases by that firm, as opposed to rates that reflect the prevailing community rate for similar legal services? See Blum v. Stenson, 465 U.S. 886 (1984).

Per Curiam
FOR THE COURT
George A. Fisher,
Clerk

BY:
Robert A. Bonner
Deputy Clerk